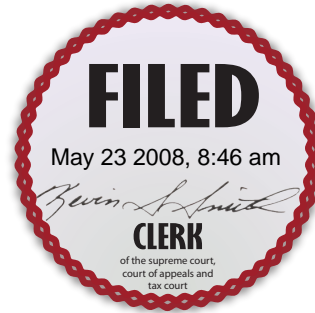


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DEQUINCY LOPEZ,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0711-CR-945

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Steve Eichholtz, Judge  
Cause No. 49G23-0612-FD-240489

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**May 23, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

DeQuincy Lopez (“Lopez”) was convicted in Marion Superior Court of Class B felony possession of cocaine, Class D felony theft, and Class A misdemeanor possession of paraphernalia. Lopez also pleaded guilty to being an habitual substance offender. The trial court sentenced Lopez to an aggregate term of twenty years, with ten years suspended. Lopez appeals and claims that his sentence is inappropriate in light of the nature of his offenses and his character. We reverse and remand with instructions to correct a sentencing error.

### **Facts and Procedural History**

In the early evening hours of December 13, 2006, Lopez went into a filling station convenience store in Indianapolis, placed a box of candy bars in his pants, and left the store without paying. The police were dispatched to the store at 6:14 p.m., where they discovered Lopez sitting in the driver’s seat of a car parked by a fuel pump. The box of stolen candy bars was next to Lopez on the passenger’s seat. The police arrested Lopez for theft. During a search incident to this arrest, the police found a crack pipe on Lopez. During an inventory of the car Lopez had been sitting in, the police found a small plastic baggie which contained 0.0377 grams of cocaine. The police also saw cocaine residue on the well of the driver’s side door handle. The filling station where Lopez was arrested was 707 feet from a public park.

The State ultimately charged Lopez as follows: Count I: Class D felony theft; Count II: Class D felony possession of cocaine; Count III: Class A misdemeanor possession of paraphernalia; Count IV: Class D felony possession of paraphernalia; and Count V: Class B felony possession of cocaine within 1000 feet of a public park. The

State also alleged that Lopez was an habitual substance offender. On the day of Lopez's jury trial, the State dismissed Count IV. The jury found Lopez guilty as charged. On September 6, 2007, as part of a plea agreement involving other pending charges against him, Lopez admitted to being an habitual substance offender.<sup>1</sup>

At a sentencing hearing held on September 17, 2007, the trial court sentenced Lopez to three years upon Count I, one year upon Count III, and twenty years, with ten suspended, upon Count V.<sup>2</sup> With regard to the habitual substance offender enhancement, the trial court imposed a two year sentence. All sentences were ordered to run concurrently. Lopez now appeals.

### **Discussion and Decision**

Lopez contends that the sentence the trial court imposed upon Count V, Class B felony possession of cocaine, is inappropriate. Pursuant to Indiana Appellate Rule 7(B), this court may revise a sentence otherwise authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Given Lopez's extensive criminal history, we are not inclined to agree with his claim that the trial court erred in imposing the maximum sentence upon his Class B felony conviction.<sup>3</sup> However, we need not

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<sup>1</sup> In exchange for this admission and to Lopez's plea of guilty to three counts in two other causes, the State agreed to dismiss seven other counts in those causes.

<sup>2</sup> The trial court "merged" Count II into Count V.

<sup>3</sup> Lopez has an extensive criminal history: he had one referral to juvenile court, and by the time of sentencing in the present case had accumulated sixteen adult convictions, including eight Class D felony convictions, and has also had his probation revoked six times. Lopez has been charged with many more crimes, but had these charges dismissed for various reasons. See Pickens v. State, 767 N.E.2d 530, 534

actually determine whether Lopez's sentence is inappropriate. This is so because of an error we have noticed regarding the trial court's treatment of the habitual substance offender enhancement.

At the sentencing hearing, the trial court first imposed sentence upon Count V, the Class B felony conviction. After this, the trial court stated simply, "On Count VI, the sentence enhancement, that is an additional two years pursuant to your plea agreement." Tr. p. 204. The court then proceeded to sentence Lopez on Counts I and III. In the materials before us, we are unable to locate a separate, written sentencing order, but a copy of the Abstract of Judgment is included in the Appellant's Appendix. The Abstract indicates that the trial court treated the habitual offender enhancement as a separate, two year sentence to be served concurrently with the other sentences imposed.<sup>4</sup> This is improper.

As explained in Reffett v. State, 844 N.E.2d 1072 (Ind. Ct. App. 2006), an habitual substance offender finding does not constitute a separate crime nor does it result in a separate sentence. Id. at 1074 (citing Greer v. State, 680 N.E.2d 526, 527 (Ind. 1997)).<sup>5</sup> Rather, an habitual substance offender finding results in a sentence enhancement imposed

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(Ind. 2002) (a record of arrests cannot establish the historical fact of prior criminal behavior, but it can speak to the defendant's undeterred antisocial behavior).

<sup>4</sup> The Department of Correction's website likewise indicates that Lopez is serving a separate, concurrent sentence upon the habitual substance offender finding. See <http://www.in.gov/apps/indcorrection/ofcs/?lname=lopez&fname=dequincy&search1.x=0&search1.y=0>

<sup>5</sup> The Greer court addressed habitual offender enhancements. As explained in Reffett, because the language of the habitual substance offender statute mirrors the language contained in the general habitual offender statute, decisions interpreting the habitual offender statute are applicable to issues involving the habitual substance offender statute. 844 N.E.2d at 1073-74 (citing Roell v. State, 655 N.E.2d 599, 601 (Ind. Ct. App. 1995)).

upon the conviction of a subsequent substance offense. See id. (citing Greer, 680 N.E.2d at 527). Thus, “trial courts must impose [habitual substance offender enhancements] upon only one of the convictions and must specify the convictions to be so enhanced.” Id. (quoting Greer, 680 N.E.2d at 527); see also Bauer v. State, 875 N.E.2d 744, 747 (Ind. Ct. App. 2007), trans. denied. We therefore conclude that the trial court in the present case erred by ordering the habitual substance offender enhancement to run as a separate two year sentence. We reverse and remand for resentencing consistent with this opinion.

Reversed and remanded.

MAY, J., and VAIDIK, J., concur.